Preparing the Winning Case

"Plans are worthless, but planning is everything."
Dwight D. Eisenhower

I. Importance of Preparation

A. Experts agree in general that approximately 70% of the result of a trial is determined in preparation. Trial planning should begin as soon as you are handed a case.

B. Considerable advantage is gained not only by familiarity with the facts, but by planning the trial as a whole, first broadly then in detail.

C. This is in contrast to trying the case off the top of your head.

D. As a trial attorney it is your duty to properly prepare. Failure to adequately prepare can lead to an ineffective assistance counsel finding.

II. Interrelated Parts Concept

A. All phases of the trial (voir dire, cross-examination, closing argument, etc.,) must fit together to advance one point of view in one overall plan. They are not independent.

B. When planning or carrying out one phase of the trial, there must be constant attention to obtaining information which will "set up" all later phases of the trial. For example, the preliminary hearing may be used to "set up" a hearing on a later motion to suppress, or to "pin down" a witness for purposes of later cross-examination at trial.

C. Thinking only of issues in the present hearing, etc., is a trap. Avoid it.

III. The Trial Plan

A. The only way to insure that each phase of the trial works with every other phase to advance the defense position is to prepare a Trial Plan.

1. Preparing a Trial Plan insures that everything you do during the trial advances the defense position as it will be set forth in closing argument.

2. You cannot properly conduct a trial off the top of your head.

B. The Trial Plan should adhere to the concepts set forth below.

C. The Trial Plan will result from following the steps set forth below.

D. Creating a Trial Plan serves many and important purposes.

1. It forces you to prepare with considerable and deep thought.
2. It insures consistency within your case.
3. It creates maximum impact for the position you are selling.
4. It gives you and your case integrity.
5. It makes decisions during the trial easier because it provides you with a basic position from which to operate.
6. It helps preserve and direct your energy.

IV. The "Thought Notebook"—a Notebook to use Throughout Preparation

A. Set up a loose-leaf notebook for each case.

1. Smaller than letter-size is suggested (for carrying ease).

B. Put the client's name on the cover (with a label-maker).

C. Use dividers to set up the following sections:

1. Things to Do
2. Strategy
3. Facts
4. Positive Defense Position
5. Attack
6. Motions
7. Voir Dire
8. Opening
9. Prosecution Witnesses
10. Defense Witnesses
11. Instructions
12. Closing
13. Law
14. Error

D. The Thought Notebook safeguards all ideas.

1. Provides a place to record each idea as it occurs.
2. Insures against forgetting ideas.

a. We always think we will not forget – but we do.

E. The Thought Notebook serves as a vehicle to organize your thoughts.

1. All items relating to a particular phase or witness will be in one place.
2. No intermingled cross-examination, closing argument, voir dire, etc., as with the yellow pad.

F. Within "Prosecution Witnesses" and "Defense Witnesses," use separate pages for each separate witness.

V. Brainstorming—A Process to use Throughout Preparation

A. Brainstorming is a process in which you let your imagination run wild in coming up with and writing down in the Trial Book every possible thought, defense, approach, theory, concise way to say something, analysis, interpretation of a fact or facts, strategy, tactic, further needed investigation, strategic problems, etc.

VI. Basic Concepts to Apply Throughout Preparation and Guide You at Every Step

A. Everything you do must be done with consideration to creating and maintaining the jury's belief in your integrity and the integrity of your case.

B. What to do otherwise is a matter of judgment, not of rules. The OPD cannot give you a set of rules to govern your actions. The OPD can only give you factors to consider in making trial decisions.

C. You must be yourself. You should not use a particular technique or strategy simply because you saw some other attorney use it.

D. Use "People Points" not "Lawyer Points." Lawyers are unfortunately conditioned in law school to think so much in legal terms that our actions are often unconvincing to a jury. Jurors don't think in legal terms; they think in "common sense" terms.

E. Your attitude must be that of a winner. You must feel, even when on first impression the case appears hopeless, "I am going to find a way to win."

F. Approach the case from an adversarial standpoint, not from that of an impartial arbiter. Adopt an attitude which says: "I'm going to find a. way to win.

G. Most strategies or tactics are not blockbusters which by themselves will win cases. Most

of the time, each phase can add only slightly to the chances of winning. It is by using every opportunity to increase chances by some small amount that most cases are won. You must play the percentages.

H. Confront the difficult situations. It's human nature to shy away from confronting the difficult situations. You must avoid that line of thinking. Don't be afraid of failing. Only by believing you can will can you win.

I. All phases of preparation are going on all at once and are never finished until the trial is over. An idea for closing argument brings to mind an idea for cross- examination which necessitates additional investigation and so on.

VII. Steps on the Journey to a Solid Trial Foundation

A. Learn Every Fact Possible

1. Panning for gold. The prospector used a pan to bring material from the bottom of a stream. He shook the pan so the nuggets would be at the bottom. He kept the nuggets and threw the rest away. The more material he went through, the more nuggets he had. As a trial lawyer the more facts you learn, the more nuggets obtain for use in trial. The facts not helpful are ignored.
2. The fear that any facts unearthed will always be on the other side is a trap. Avoid it. Even if your client is guilty, there are always facts pointing to innocence.
3. Talk to the witnesses.
4. Obtain discovery.
5. Go to the scene.
6. Learn physical facts.
7. Study statements of witnesses in detail.

B. Look at the Law

1. Read the statutes and list the elements to ascertain with certainty that which is available as a defense.

C. Choose a Defense

1. Out of the possibilities produced by brainstorming, choose the best defense (not limited to affirmative defenses).

    a. The "shotgun" or multiple defenses might be used but only after very

careful consideration.

1) It might be the best available when one sees no weakness in the prosecution's case.

2) It does allow one to "test" all parts of that case.

3) The technique is as follows:

   a) Hit them in many places.
   b) Raise many questions on closing.
   c) Hit in brief, hard-hitting, concise paragraphs, and then go on to the next point.
   d) Spread the opposition—they can't answer it all.

4) The disadvantages of a multiple defense are two-fold:

   a) You have to deal with so many points that it is impossible to have the emphasis which is available in utilizing a "single" defense.

   b) Using a "pony express" defense (shifting from one defense to another), or "riding two horses at once" (multiple defenses), will cause the jury to feel you are fishing for a defense and just hoping something will turn up, making it difficult for the jury to maintain a belief in your integrity or the integrity of your case.

b. Normally, you should choose the single best defense.

1) The prosecutor must prove everything. Her task is like building a brick wall and there can be no weaknesses. The defense is much more flexible and can, if it wishes, concentrate all its strength and attack on one part of the prosecution's case, achieving great emphasis.

   a) With the single best defense the goal is to have made one point or impression so strongly that it irresistibly will be the central topic of discussion when the jury goes into the jury room to deliberate.

2) Using the single best defense does the most to create and maintain the jury's belief in your integrity and the integrity of your case.

c. In selecting a defense the best one will ordinarily be one that the prosecutor is least capable of "pinning down."

1) **Example:** Denying the bullet holes is a mistake. Lack of intent, mistaken identification and other debatable issues are better choices. Defenses in the "fuzzy" areas, such as identification, intent, etc., provide the best chance for acquittal.

2) Look for a defense which gets around the facts which are the prosecutor's strong points.

D. Analyze the Facts Using the Brainstorming Process.

1. Refuse to buy the first impression. Avoid the "first impression trap" into which the police and the prosecutor have fallen.

2. Ask: Can the source of the "fact"—the witness—be destroyed by showing incompetency, bias, prejudice, etc.?

3. Ask: Can the witness be shown to have no personal knowledge, not to remember, not to have observed correctly, to have "filled in" since the incident, or not to be able to state his observations accurately?

4. Ask: Can the "fact" be successfully disproved?

5. Ask: Can one use the fact which appears to be helpful to the prosecutor and "turn the tables"-- that is, find a way to use the fact on one's own side? When given a lemon, one can make lemonade far more often than ordinarily thought.

6. Ask: Can one explain or weaken the effect (take the sting out) of their evidence?

7. Determine which "facts" are ones that the jury will believe in spite of the best efforts of counsel and, therefore, are *facts beyond change* (FBC's).

a. The trial plan will have to recognize and be limited by the FBC's. To fight them damages one's credibility and creates doubt as to the rest of

one's case.

8. Analyze inferences and conclusions as well as facts.

9. Ask: What favorable inference can be drawn where the prosecutor thinks only unfavorable ones can be drawn?

10. Ask: What favorable conclusions can be reached?

11. Ask: What are the possible ways to put the facts together consistent with innocence? [To be dealt with more extensively under Step E.]

12. Create-A-Case concept

    a. Create inconsistencies. Ask the witness about the same subjects on various occasions. Inconsistencies will inevitably develop.

        1) Be sure to "pin down the witness" so the witness cannot wiggle out of the inconsistency.

    b. Develop latent facts—ones that you will have to think out which are not in the discovery.

        1) Things not done. What are the scientific tests available but not ordered done by the investigating detective? What investigation was not done?
        2) Motives of parties involved.
        3) Reasonableness of testimony and positions taken.
        4) Additional analysis of "latent facts" appears under Step F.

E. Design a Positive Defense Position (Hypothesis of Innocence)

1. Jurors do not like a defense case which is solely an attack on the prosecution's case. They want to know how the defense says it happened consistent with innocence. Therefore, you must to come up with a positive defense position.

2. The process is like solving a puzzle. Accept the facts that the jury will believe in spite of themselves. The problem is coming up with the hypothesis which includes those facts and yet shows the client to be innocent. Figure out how this is true.

3. To solve the puzzle, use brainstorming.

    a. Use every possible combination of facts to find the picture of innocence.

    b. Look for favorable interpretations, inferences and conclusions.

    c. Continue thinking and turning the facts every which way until, as will happen, one has a hypothesis of innocence.

    d. The police and the prosecutor have fallen into the trap of first impression – and they will work very hard to sell that impression to the jury. That's the easiest path for the jurors to take. You must show the jury that innocence requires deeper thought – and that deeper thought will establish innocence.

F. Prepare Attack on Prosecution's Case

1. Create inconsistencies and pin down the witnesses.

2. Look for weaknesses by various analyses.

    a. Scientific analysis for scientific tests not performed.
    b. Investigatory analysis for investigation not done.
    c. Inconsistency analysis for inconsistencies within each witness's testimony, between the testimony of witnesses, and between testimony and physical facts.
    d. Time analysis to show witnesses are inconsistent as to times events occurred.
    e. Motive analysis for reasons for testimony and actions of parties.
    f. Reasonableness analysis. Determine whether actions described are consistent with actions of a reasonable person. A jury can reject testimony just because it is not reasonable. This sets up the argument, "Does it make sense that....?"

G. ANSWER JURY QUESTIONS

1. Forget that you're a lawyer and put yourself in the shoes of Juror No.3.
    a. Is the defense case consistent with common sense or does it sound like legalistics?
    b. Are the points made "people points" rather than "lawyer points"?
    c. If one is claiming that a witness is lying, jurors want to know why. One

must search for the motive to lie. Why would a witness make a mistake in identification, etc.?

d. In general, jurors analyze more deeply than attorneys. To be persuasive the attorney must have analyzed deeply in a common-sense way.

H. Simplify the Defense Position Until it can be Stated in a Few Words

1. Until the position can be stated in a. few words, it is unlikely that you have a sufficient "handle" on the case to make it understandable and persuasive to a jury.

I. Develop Depth

1. Once you have focused on the central issue in the case, take your side of that issue and come up with every possible additional fact, and every possible additional reason supporting that position.

2. This additional depth will give you the winning support for your conclusion in closing argument.

J. Decide the Defense Position on Details

1. From the basic position you should consider smaller situations anticipated in trial and determine what the strategy will be as to each of them.

a. <u>Ask:</u> What is the defense position as to each piece of evidence?

b. Decide whether to go "all or none" or have lesser-included offenses submitted.

c. Decide when the defense is to be revealed.

1) It may be obvious or strong or both, so it is best to push it from the start.

2) The defense may be weak and good only if there is surprise; therefore it should be revealed only in the closing argument when it has greatest psychological impact, and it is too late for the prosecutor to think of a good answer.

d. Decide whether to have your client and other witnesses testify as

(discussed further in the. outline entitled, "The Defendant's Case")

K. Plan the Strategy of the Trial

1. Recognize that a trial is a contest. Strengths, weaknesses, timing, strategy, tactics, and other concepts applicable to contests should be considered.

2. Consider having only one point of attack on the prosecution's case and marshal all the strength of your case against that one point.

3. Decide which issue is going to be made central to the case and maintain control of the trial by never getting away from the central point which is your strongest vis-a-vis the prosecution.

4. Consider surprise.

5. Determine how to get the momentum, at least at the last, and how to gain the greatest impact.

6. Determine what positions to take so as to be least vulnerable to attack by the prosecution.

L. Plan Individual Phases of the Trial

1. Now for the first time you are ready to plan the voir dire, opening statement, cross-examinations, etc., because now for the first time you know what position is to be advanced in each phase.
2. The planning of the individual phases should follow the suggestions in the outlines on these individual subjects.

M. Plan the Psychology of the Trial

1. Plan what psychology will work for you in gaining acquittal (as contained in the outline entitled, "Psychology in Trial").

N. Some final comments --

1. Know how your jurisdiction handles things like courtroom etiquette, placement of exhibits, order of seating of the jurors, where the bathrooms are, etc.
2. Make yourself familiar with the clerks of court that work trials, the bailiffs and

everything about how trials are done.

3. If possible, go watch a trial from start to finish.
4. Don't act surprised, even if you are surprised.
5. Remember to thank the judge after he/she gets done chewing on you..